1991

Society of Separationists, Inc., Chris Allen, Richard Andrews v. Jay B. Taggart : Reply Brief

Utah Supreme Court

Attorney for Appellee; John S. McAllister; Assistant Attorney General.
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IN THE SUPREME COURT OF THE STATE OF UTAH

SOCIETY OF SEPARATIONISTS, INC. a Maryland non-profit corporation; **CHRIS ALLEN;** and, **RICHARD ANDREWS,**	**Case No. 91-0387**
Plaintiffs/Appellants, vs.	
JAY B. TAGGART, Utah State Superintendent of Public Instruction,	**Priority No. 16**
Defendant/Appellee	

REPLY BRIEF OF APPELLANTS SOCIETY OF SEPARATIONISTS, INC., CHRIS ALLEN and RICHARD ANDREWS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY THE HON. TIMOTHY R. HANSON, JUDGE PRESIDING
(Trial Court Case No. CV-91-090-2848)

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THE PLAINTIFFS/APPELLANTS, SOCIETY OF SEPARATIONISTS, INC., CHRIS ALLEN AND RICHARD ANDREWS, (collectively hereinafter "the Society"), by and through their counsel of record, BRIAN M. BARNARD and JOHN PACE submit the following Reply Brief in further support of their appeal and in response to issues raised by appellee in his recent brief.

RECORD ON APPEAL

At more than point in his brief, the defendant, Jay Taggart, the former Utah State Superintendent of Schools (hereinafter "the Superintendent") claims that the Society filed no response in the court below to the Superintendent's Motion to Dismiss and supporting memorandum.[1] The Superintendent makes this assertion despite the fact that his counsel received a copy of the Society's opposition memorandum and filed a pleading objecting to the Society's opposition memorandum being untimely filed in this matter. T.R. p. 31-32. While the index of the record on appeal does not currently include the Society's opposition memorandum, the computer entries of the Third Judicial District Court in and for Salt Lake County indicate that the trial court clerk's office did indeed receive the Society's memorandum on July 8, 1991. The Society has written to the Clerk's Office of the Third Judicial District Court, requesting that this oversight be corrected and that the memorandum be included in the record on appeal. This request (a letter of

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[1] Whether plaintiffs filed a memorandum in opposition to defendant Superintendent's motion to dismiss is of little moment. With or without a memorandum in opposition to defendant's motion to dismiss, the trial court must still objectively examine the complaint and determine its validity under Rule 12 (b), Ut.R.Civ.Pro.

August 26, 1992) is attached as Exhibit "L". Thus, the Society's Memorandum in Opposition to Motion to Dismiss was filed with the Third District Court before Judge Hanson ruled in this case and was received by counsel for the Superintendent in time for him to object to the lateness of the filing. That Memorandum is part of the pleadings in this case and should be incorporated as part of the record for appeal.

STANDARD OF REVIEW

Characterizing this appeal as a review of purely legal questions -- dismissal for lack of standing or for mootness -- the Superintendent appropriately confirms that this Court need not defer to the lower court's ruling. Curiously, the Superintendent adds that where the lower court had made factual determinations, this Court must apply the substantial evidence standard on review. However, in the present case, there are no factual determinations to which this Court must defer. Because the Society's claim was dismissed under Rule 12(b)[2] of the Utah Rules of Civil

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[2] The grounds for the lower court's dismissal of this case are unclear. While the judgment does grant the Superintendent's motion to dismiss, the ruling could be based on a 12(b)(6) motion -- a failure to state a claim, or

Procedure, any conclusions in the lower court are necessarily conclusions of law. Standing and mootness are strictly legal questions while procedural law clearly establishes that for the purposes of a Rule 12(b)(6) dismissal -- no factual disputes are reached. Instead, the facts must be construed in a manner most favorable to the plaintiff.

The Superintendent also fails to recognize the particularly lenient standard to review a judgment granting a motion to dismiss: "When challenging a dismissal under Rule 12(b)(6) [Utah Rules of Civil Procedure] the appellant is entitled to a generous standard of review." Olson v. Park-Craig-Olson, Inc., 167 Utah Adv. Rep. 18, 20 (Utah Ct. App. 1991), ___ P.2d ___, *citing* Arrow Industries v. Zions First National Bank, 767 P.2d 935, 936 (Utah 1988) (Dismissal for failure to state a claim appropriate only "where it appears **to a certainty** that the plaintiff would not be entitled to relief under **any** state of facts which could be proved in support of its claim.") (emphasis added).

To determine the propriety of dismissal under Rule 12 (b)(6), the reviewing court must "accept the factual

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upon lack of standing or a finding of mootness which can be considered jurisdictional issues.

allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." Coleman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990). Whether a trial court properly granted a motion to dismiss is a question of law to be reviewed under a correctness standard; the trial court's ruling is given no deference. St. Benedict's Dev. v. St. Benedicts's Hosp., 811 P.2d 194, 196 (Utah 1991)

Regardless of the grounds for dismissal of this case, this Court owes no deference to the conclusions of the trial court. In addition to applying a generous standard of review to the Society's claims, this Court must assume the truth of all factual allegations in the complaint and must make all reasonable inferences which favor the plaintiffs' claims.

STATEMENT OF FACTS

For the purposes of this appeal of a Rule 12(b)(6), Ut.R.Civ.Pro. dismissal, this Court must accept the material allegations of the Society's complaint as true and must indulge all reasonable inferences in the Society's favor. Arrow Industries, 767 P.2d at 936. Therefore, any opposition or attempt at contravention by the Superintendent to

the factual allegations contained in the Society's complaint is inappropriate. By filing a motion to dismiss, the defendant **"admits"** all of the facts in plaintiff's complaint contending that even if proved the facts do not establish a cause of action or claim. Necessarily, the defendant forfeits the opportunity to contest factual allegations in the complaint.

In addition, because a Rule 12(b)(6) judgment is a ruling on the pleadings, a reviewing court is not troubled with whether evidence exists to support the allegations in the complaint. Instead, the court is concerned with whether there is some set of facts which the plaintiff can hypothetically prove to validate her claim. Again, the Superintendent's repeated objections in his brief to the lack of evidence, the lack of a record and the lack of findings of fact in this case are improper.

The Superintendent in his recent brief makes additional "factual" assertions that are difficult to swallow. Admitting that in July, 1990, the federal Court of Appeals for the First Circuit affirmed a lower federal court decision that prayer at public school graduations was unconstitutional, the Superintendent laments that litigation over the prayer issue in Utah meant that "public officials

were at the mercy of anyone who claimed a violation by either allowing or preventing prayer." Appellee's Brief at 6. With a little research, the Superintendent would have realized that the state is under no obligation to make state facilities available for religious worship, Abington School District v. Schempp, 374 U.S. 203 (1963); Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985) (distinction on basis of religious content in limited forum of public schools justified under the establishment clause), and is prevented from doing so under state law. Utah Const. Article I, § 4. Rather than seeking reversal of the First Circuit position, the Superintendent could have abided by clear Tenth Circuit and federal Supreme Court precedent which, endorsing the Lemon test, uniformly rejected prayer at public schools. Edwards v. Aguillard, 482 U.S. 578 (1987); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990); Bell v. Little Axe, 766 F.2d at 1402 (10th Cir. 1985) (recognizing "the special concern for religious neutrality in the public school setting"); *see also* Jager v. Douglas County School District, 862 F.2d 824, 829 fn. 9 (11th Cir. 1989) ("There is no rationale for applying this limited, historically-based [Marsh] exception to religious invocations that occur prior to high school football

games."). To render the "Utah litigation moot," the Superintendent needed only to halt the practice of prayer at high school graduations. The applicable law in Utah and in the federal 10th Circuit would have clearly supported such a move. Id.

Because the Superintendent bypassed an obvious, neutral and legal opportunity to solve his "dilemma" by terminating the practice of prayer in Utah public schools, his support of the Providence, Rhode Island school board appeal represents -- that much more -- a pro-prayer stance. Additionally, even though the Superintendent contends that Utah took no position on the merits of the Rhode Island case, he admits that the appeal for which taxpayer money was allocated was a request to overrule the First Circuit's injunction against prayer at graduation ceremonies. Appellee's Brief at 7. This is not a neutral stance but out-right support for the position that prayer should be allowed in the public schools. Certainly, the Superintendent did not expect the Rhode Island school board to seek **certiorari** review of their case hoping that the Supreme Court would affirm the Court of Appeals' opinion. Therefore, despite the Superintendent's attempts to characterize his ten-thousand dollar ($10,000.00) gift to

the Rhode Island pro-prayer legal campaign as neutral, the appropriation should be recognized as an obvious expenditure of Utah public funds to aid the practice of religious worship in Utah's public schools as well as in the schools of Rhode Island.

SUMMARY OF ARGUMENT

Utah courts are unwilling to deny deserving plaintiffs access to and an opportunity for a hearing on the merits of their claims. None of the Superintendent's arguments against allowing the Society an avenue for resolution of their claims can overcome the reluctance of the courts to turn away a complaining party. The Superintendent cannot refute the Society's claims: Although, in part, technically moot, the Society's causes of action readily fall in to the exceptions to the mootness doctrine. In addition, as taxpayers, the members of the Society have standing to assert their claims of unconstitutional appropriation of public funds. The mere fact that the Superintendent was able to send ten thousand dollars ($10,000.00) off to Rhode Island before plaintiffs filed this suit, does not prevent plaintiffs from challenging his mis-conduct and seeking a declaratory judgment as to the illegal nature of the act.

Finally, examination of the Superintendent's justifications for his unlawful expenditure reveal that his arguments are unconvincing. The detailed and absolute language of Article I, § 4 of the Utah Constitution specifically prohibits the disposal of public funds in aid of religious exercise. No characterization of the Superintendent's activities can hide the unlawfulness of his contribution to the Rhode Island pro-prayer legal campaign.

ARGUMENT

I. The Society's Request for Declaratory Relief Requires Judicial Attention.

The Superintendent's arguments that the plaintiffs' claims are not properly before this Court misfire. The Society's request for declaratory relief raises constitutional questions and issues of official conduct of particular importance to Utah's citizens. The willingness of various Utah officials to financially support pro-religion litigation in Rhode Island also indicates that their behavior is likely to be repeated. Finally, ample case law indicates that, as taxpayers, individual plaintiffs and the Society have standing to challenge the unlawful expenditure of public funds and to seek declaratory relief even after the expenditure has been made.

A. The Issues Presented by the Case Before the Court are Not Moot.

Interestingly, to argue for his position that the Society's claim is moot, the Superintendent emphasizes that "[t]here is nothing left for this [C]ourt to enjoin." Superintendent's Brief at 13. This comment and others like it ignore that the Society's complaint seeks judicial declaration of the unconstitutionality of the Superintendent's ten-thousand dollar ($10,000.00) expenditure. While the Society's request for injunctive relief may indeed be moot, its request for declaratory relief deserves judicial attention.[3] By mis-characterizing the Society's claim as a request for only injunctive relief, the Superintendent avoids addressing compelling arguments favoring a declaratory ruling on the merits of this case.

Indeed, the Superintendent fails to recognize that analysis of the exceptions to the mootness doctrine further indicates that the Society's request for declaratory relief deserves judicial attention. None of the arguments advanced

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[3] However, references to past promises of Utah's public officials to become more involved in the Rhode Island School Prayer case -- issues pertinent to the issue of injunctive relief -- remain relevant in this case. The willingness of these officials to advance religious exercise with expenditures from the public coffers indicate that these officials found nothing reprehensible and that similar spending practices are likely to reoccur in the future.

by the Superintendent counter the Society's right to have a hearing. For example, by citing Hoyle v. Monson, 606 P.2d 240 (Utah 1980), the Superintendent fails to lend credence to his position. Rather than refusing to decide a constitutional question because of mootness, the Hoyle Court determined that plaintiffs lacked **standing** to pursue their claims. The Hoyle plaintiffs were challenging the constitutionality of a filing fee required of candidates for United States Congress as applied to impecunious candidates. Because plaintiffs were not impecunious, the Court concluded that they lacked standing to bring their claim. Although the Superintendent quotes Hoyle to support his mootness claim, the case provides no support for this mootness assertion.

The Superintendent further insists that "[t]he fact that it is theoretically possible that the state may make unconstitutional expenditures some time in the future is irrelevant." Appellee's Brief at 14. Quite the contrary, that an issue is "likely to recur in a similar manner" is exactly analysis adopted to determine when a claim, though technically moot, is justiciable. Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981); Kelp v. Schwendiman, 735 P.2d 413

(Utah 1987).[4] The Superintendent wants to convince this Court that there is no reasonable expectation that Utah public officials will again appropriate public funds in a manner **similar** -- not necessarily identical -- to this case. At the same time, the Superintendent argues that his expenditure was necessary because the then current federal constitutional establishment law was not settled. Clearly, similar uncertainty is likely to reoccur often in the area of religious establishment law, and Utah public officials will be tempted again to contribute to legal campaigns which support religious exercise. Indeed, there was little, if any, disagreement concerning the prohibition of prayer in public schools -- indicating that whenever the slightest confusion over the law exists, Utah public officials will feign confusion and feel free to invest public funds in securing a legal outcome favorable to religious exercise.[5]

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[4] Although the Utah Courts are not bound by the strict "case and controversy" jurisdictional requirement of the federal Constitution, the Superintendent attempts to bolster his contentions with reference to federal law.

[5] The weakness of the Superintendent's assertions that future, unlawful expenditures are unlikely to occur is evident when his reasoning is further analyzed. For example, if the Rhode Island prayer case had been decided differently, if graduation prayer had been allowed on the basis of the Marsh test, then there would be ample opportunity for Utah to become involved in all sorts of litigation concerning prayer in public schools -- litigation

Finally, and most importantly, if the issues in this case are not addressed, then any similar expenditures in the future will also be effectively immune from constitutional challenge. The Superintendent argues that since the money has already been sent off to Rhode Island, he is not answerable either for injunctive or declaratory relief.[6] The Superintendent should not be able to thus hide behind the mootness doctrine since the issues raised by his actions would "evade review" contrary to the judicial policy of the courts of Utah. Wickham v. Fisher, 629 P.2d 896 (Utah 1981).[7]

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to which it was not a party. Yet, the actual outcome of the Rhode Island prayer case should not determine whether the issue of the constitutionality of the Superintendent's past expenditure.

[6] The Superintendent falsely states that counsel for the Society was informed before payment of the ten thousand dollars ($10,000.00) was made, that the money would be sent to Rhode Island. Appellee's Brief, p. 15. In fact, counsel for the Society was informed for the first time, by a letter of March 11, 1991 from Douglas F. Bates, attorney for the State Board of Education that the money had already been sent to Rhode Island, based upon authorization (dated January 23, 1991) from the Attorney General to do so. This action was filed on Law Day, May 1, 1991.

[7] The Superintendent erroneous objects to the Society's discussion of a "range of possible violations of article I, § 4 by Utah officials." Appellee's Brief at 13. However, the test for an exception to the mootness doctrine must involve consideration of future events, uncertain to occur. Ignoring strong precedent which determined that issues almost identical those raised in the present case

B. Both the Society and Individual Plaintiffs Have Standing to Challenge the Superintendent's Unlawful Expenditure of Public Funds.

The Superintendent errs when he boldly asserts that, on the basis of Jenkins v. Swan, 675 P.2d 1145 (Utah 1983), the Society lacks standing to challenge the Superintendent's unlawful expenditures. While Jenkins was denied standing to contest service of Utah educators in the Utah Legislature, the Utah Supreme Court determined that it was because Jenkins was not a resident of a school district that adopted or engaged in the challenge practice. Id. Thus, "Jenkins' interest [was] less direct than the interest of those living in the relevant school districts of legislative districts." Id. at 1151. Rather than rejecting taxpayer standing to challenge contest unconstitutional appropriations of public funds, Jenkins **upholds** the practice of the Utah courts to grant "taxpayers standing to challenge the actions of political subdivisions for illegal expenditures and to

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were indeed likely to reoccur, the Superintendent improperly equates the notion of "similar" case to that of "identical" case. He quotes (federal court) language that maintains that the future cases must involve the same "complaining" party, Appellee's Brief at 16, and then suggests that the Superintendent will not be involved in any future unlawful expenditures of public funds. However, the Society, not the Superintendent is the complaining party in this case and is very likely to become involved in future litigation over the propriety of appropriations of public funds to aid religious worship, exercise or instruction.

challenge the illegal use of public funds." Olson v. Salt Lake City School District, 724 P.2d 960, 962 fn. 1 (Utah 1986) (*citing, among other cases,* Jenkins v. Swan at 1152-53). Therefore, there is no doubt that the individual plaintiffs and the Society have standing as taxpayers to bring this present action.[8]

The Superintendent's next argument against the Society's right to bring this action suggests that someone, other than plaintiffs, has a greater interest in the outcome of this case and that the issues in this case would be raised even if the Society were denied standing. Appellee's Brief at 18. This argument falls flat. Although there are other cases, to which the Society is a party, that deal with the constitutionality of prayer in certain public settings, these cases do not address, more than indirectly, the propriety of the unlawful expenditure of public funds in the

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[8] Although the Society itself is tax exempt, its members clearly pay taxes to the State of Utah. Organizational standing is based upon the injury to its members, not to the organization itself. Sierra Club v. Morton, 405 U.S. 727 (1972). In addition, even cursory examination of plaintiffs' complaint indicates that plaintiffs did indeed make allegations of individual harm. Complaint ¶ 12 - 18.

context of litigation to which Utah is not a party.[9] Unless the Society is granted standing, the state constitutional restraints upon this activity will remain unresolved.

The Superintendent's odd suggestion that **the Society has a greater interest than itself**, is also unconvincing. Appellee's Brief at 19. The Superintendent suggests that because other litigation in which the Society is involved raises an issue similar to that raised herein, that the issue should be resolved in the other litigation rather than in this case. Id. Certainly, the Society has an **equal** interest in pursuing each of its claims pending in various Courts. The Society does not claim, and the Superintendent cannot legitimately assert the Society has, a greater interest in seeking relief from unconstitutional expenditure of public funds in one of its cases as opposed to another. Besides, this case has now reached the appellate level where a decision will have broad effect. The consideration under Jenkins' standing analysis of a litigant having "a greater interest" in litigating and resolving an issue applies to another party and not to the same party that may be litigating a similar issue in another case.

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[9] In addition, resolution of the issue in this case by this Court may aid in answering similar questions in other litigation in which the Society is currently involved.

Calling his expenditure "relatively small," the Superintendent contends that the issue of unlawful expenditures is of insufficient importance to warrant judicial attention. The Superintendent forgets that the constitutional prohibition of aid to religious exercise is **absolute** under the Utah establishment clause and that the authors of this provision clearly did not see any unlawful expenditure as "relatively small." Utah Const. Article I, § 4. In addition, our entire judicial system is built upon the notion that illegality, especially unconstitutionality, is **never** a trifling matter. Marsh v. Chambers, 463 U.S. 783 (1983) (Brennan, J. *dissenting*) (no ***de minimis*** violations of the establishment clause); Appellant's Brief at 31-38 (discussion of establishment law of states having constitutions similar to that of Utah).

The Society has established that under the standing analysis, they have a clear right to seek resolution of their claims before this Court. The Society's complaint clearly alleges direct, adverse impact caused to them by the Superintendent's actions and otherwise serves as the basis for plaintiffs' access to this Court.

III. Article I, § 4 of the Utah Constitution Prohibits the Superintendent From Spending Public Funds to Finance a Pro-Prayer Appeal.

Unquestionably, the Superintendent gave the Rhode Island school district ten-thousand dollar ($10,000.00) to seek a writ of **certiorari** and reversal of a First Circuit injunction against prayer at public school graduations before the United States Supreme Court -- thus, the Superintendent violated the Utah Constitution. None of the Superintendent's justifications of his actions can obscure the unlawfulness of this mis-appropriation of public funds.

A. The Society Cannot be Faulted for Failure to Build a Record in its Appeal of a Judgment on the Pleadings.

Oddly, the Superintendent urges that dismissal by the trial court was appropriate in this case (and apparently dismissal by this court would be similarly appropriate) because the Society "did not support its allegations with a hearing, record or other factual basis." Appellee's Brief at 21. As established above, a motion to dismiss does not involve the presentation of or adjudication of facts. Instead, in reviewing a dismissal on the basis of a Rule 12(b) motion, the court is restricted to a ruling on the pleadings and must assume the factual allegations in the

complaint to be true. Arrow Industries, *supra*, 767 P.2d at 936.

Nonsensically the Superintendent suggests that in the absence of "factual support for the Society's claims," this Court should "presume that the lower court's decision [granting the Superintendent's motion to dismiss] is correct and so affirm." Appellee's Brief at 23. Necessarily, a motion to dismiss does not rest on factual support, Id. (motion to dismiss appropriate only when there is no set of provable facts to support plaintiff's claim), and this Court owes no deference to conclusions by the lower court concerning legal questions. Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). If this Court over rules the motion to dismiss granted below, but decides that disputed facts prevent a ruling on the merits, this Court should remand the case to the lower Court for necessary factual determinations. In the mean time, the Society's "mere [factual] allegations" are presumed to be true[10] and the Society is not obligated to bolster its case with evidence for its claims, either now nor before the trial court.

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[10] Alternatively, this Court could decide that because the resolution of this case does not depend upon disputed facts, a ruling on the merits is appropriate. Only at that point would the complaint no longer be construed in a light most favorable to the Society.

B. Undisputed Facts Readily Indicate that the Superintendent's Financial Support of Prayer in Public Schools Violates Article I, § 4 of the Utah Constitution.

Next, the Superintendent insists that his ten-thousand dollar ($10,000.00) gift to the Rhode Island school district did not violated the Utah Constitution. He contends that neither the purpose nor the effect of his actions was to promote prayer at high school ceremonies. For several reasons, these assertions lack merit. Despite the Superintendent's claims of neutrality, his substantial payment to the Rhode Island school district, enabling the defeated to contest the First Circuit's refusal to allow prayer in public schools, represents deliberate support of religious exercise. Even more evident, the Superintendent's expenditure had the **effect** of unconstitutionally promoting religious exercise. Importantly, even under federal establishment law -- less demanding than the strict provisions of the Utah Constitution -- government action which has **either** the effect or the purpose of promoting religion is impermissible. Under both the purpose and effect analysis, the Superintendent's support of the prayer in public schools is unlawful because it fails to comply with the state's affirmative obligation to "pursue a course of complete neutrality toward religion." Wallace v. Jaffree, 472 U.S.

38, 60 (1985); Lemon v. Kurtsman, 403 U.S. 602, 619 (1971) (confirming the affirmative nature of the state duty toward neutrality and non-endorsement).

Interestingly, to argue for the neutrality of his actions, the Superintendent contends that "had the writ [of **certiorari** in the Rhode Island case] been denied the Utah cases would have continued at great expense and detriment of the public schools."[11] Appellee's Brief at 27. This comment ignores that if **certiorari** had not been pursued in the Rhode Island case, previous United States Supreme Court

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[11] The Superintendent continually paints a misleading picture of the "chaos" in federal and state courts in Utah. He argues that prudence required that he financially assist Providence in its crusade to gain approval of prayer in high schools. Only this measure, he insists, would bring "order to a chaotic situation." Appellee's Brief at 24. However to effectuate a legal and guaranteed method for ending litigation in these courts, the Superintendent only needed to stop the practice of allowing prayers at graduations and other ceremonies in Utah's public schools. Clearly, the state is under no obligation to provide a forum for religious exercise. Abington School District v. Schempp, 374 U.S. 203, 225-226 (1963) (soundly rejecting the arguments that unless "religious exercises are permitted a 'religion of secularism' is established in the schools," and that free exercise means the "majority could use the machinery of the State to practice its beliefs"). No litigant has ever been successful in an attempt to compel public schools to hold public prayers. See Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990) (actions taken to avoid the violation of the establishment clause do not fail the Lemon test). In addition, claims based on Utah constitutional law would not be solved by any decisions in federal law.

precedent, decisions in the Tenth Circuit and Utah state constitutional law would and did clearly ban public prayer in Utah public schools. Nothing could be gained by seeking **certiorari** other than another attempt to get judicial approval of religious exercise in public schools.

In the absence of a ruling from the United States Supreme Court in the Rhode Island case, the Superintendent would clearly have been guided by past precedent from the highest court and the Tenth Circuit. Law from both these forums produce as conclusive a determination on the issue of prayer in Utah schools as a Supreme Court decision in the Rhode Island case.

Recently, the United States Supreme Court confirmed that the three-prong Lemon test provides the only appropriate scheme to analyzes establishment challenges to religious activity in the public schools. The Court concluded that "[t]he Lemon test has been applied in all [establishment clause] cases since its adoption in 1971, except in Marsh v. Chambers" and the historical approach adopted in Marsh "is not useful in determining the proper roles of church and state in public schools . . . ." Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct 2573, 2577 (1987).

The Superintendent's argument is as implausible as the contention that a financial contribution to a political candidate, "merely intended to insure that the individual gains access to the ballot," is a neutral act. Certainly, a contributor could claim that she was not biased toward the candidate whom she sponsored, insisting that she was only interested in "resolving" the election. Any one confronted with this argument would insist any such payments necessarily support the chosen candidate over the opposition. Similarly, payment to the Rhode Island school board to support its litigation and its goals could not be neutral. The school district was seeking judicial approval of its practice of allowing prayer at public school graduations. In its petition for **certiorari** -- a document financed in part by Utah taxpayers -- the school district did not maintain a neutral stance but instead argued aggressively for prayer. This pro-prayer position was obviously anticipated by the Superintendent. Certainly, the Superintendent could not expect the Rhode Island school board to be neutral. The structure of the adversarial judicial system entails that the Rhode Island school district defend its prayer practice through every avenue available.

Whether under an effect analysis or a purpose analysis, the Superintendent's actions were unconstitutional. His attempts to characterize his pro-prayer appropriation as neutral do not hide the clearly biased nature of his contribution. The Superintendent spent public funds to help the Rhode Island school board appeal an injunction against prayer at public school graduation ceremonies. The purpose and the effect of this expenditure was to gain judicial approval of religious exercise in schools nationwide.

CONCLUSION

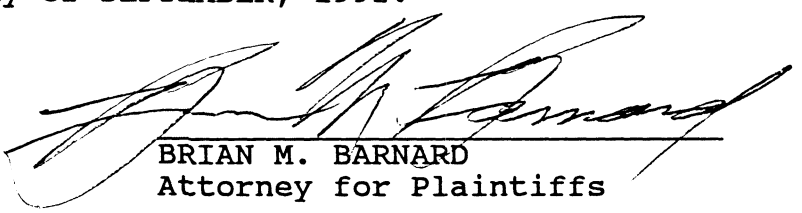
The arguments in the Superintendent's Brief have failed to lend credence to his attempts to avoid a ruling on the propriety of his aid/gift to the Rhode Island pro-prayer legal campaign. That issue is not moot. The Superintendent has offered no convincing arguments to weaken the Society's claim that this action, although, in part, technically moot, deserves judicial attention. In addition, he ignores that the Utah Courts have long been open to taxpayers. Given the reluctance of the Utah Courts to deny plaintiffs a forum for resolution of their claims, the Society has a clear right to a hearing on the merits of this case. The Society's request

for declaratory judgment is not moot and should have been considered by the trial court.

Finally, the Superintendent has not successfully countered the Society's claim that the Rhode Island gift was an unconstitutional expenditure of public funds. Rather than incidental and ancillary, the illegal appropriation of educational funds was direct financial aid in support of religious exercise and should be declared a violation of the Utah Constitution.

Wherefore, the decision of the trial court should be reversed. This Court should enter a judgment granting the Society the relief they requested, declaring the Superintendent's appropriation unconstitutional under Article I, § 4 of the Utah Constitution.

Dated this 4th day of SEPTEMBER, 1992.



BRIAN M. BARNARD
Attorney for Plaintiffs

EXHIBIT 'L'

AUGUST 26, 1992
LETTER FROM BRIAN M. BARNARD
TO CLERK, THIRD DISTRICT COURT IN
AND FOR SALT LAKE COUNTY
RE: PLEADING MISSING FROM RECORD ON APPEAL

UTAH LEGAL CLINIC

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Attorneys

John Pace
Brian M. Barnard

August 26, 1992

Alice Wong
Court Clerk
Third District Court
240 East 400 South
Salt Lake City, Utah 84111

Re: Chris Allen v. Taggart Case No. 910902848
Supreme Court Case No. 92-0233

Dear Ms. Wong:

A pleading filed on July 8, 1991 in the above mentioned case has not been entered onto the court's index in the file which is now on appeal to the Utah Supreme Court. However, the pleading has been entered into the computer which indicates that it was filed on July 8, 1991. The name of the pleading is Plaintiff's Response to Defendant's Motion to Dismiss.

Please correct the index to include this pleading. The presence of that pleading in the file has been raised as an issue in the pending appeal. It is imperative that the index accurately reflect that the pleading was filed.

If there are any questions please let me know. Thank you for your assistance.

BRIAN M. BARNARD
Attorney at Law

BMB/sj

cc: John McAllister
Asst. Attorney General

Geoffrey Butler
Clerk, Utah Supreme Court

PLAINTIFF'S EXHIBIT

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS to:

R. PAUL VAN DAM
JOHN S. McALLISTER
Attorneys General
Beneficial Life Tower
36 South State Suite 1100
Salt Lake City, Utah 84111

on the 4th day of SEPTEMBER 1992, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Plaintiffs

by _____
BRIAN M. BARNARD

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